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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 KARL HAPP,

10 Plaintiff,

11 v.

12 RENO DISPOSAL CO., a Nevada  
13 Corporation, and WASTE MANAGEMENT  
14 OF NEVADA, INC., a Nevada Corporation,

Defendants.

Case No. 3:13-cv-00467-MMD-WGC

ORDER

(Def's Motion to Dismiss First Amended  
Complaint – dkt. no. 52)

15 **I. SUMMARY**

16 On August 26, 2014, this Court granted Defendants' motion to dismiss with leave  
17 to amend. (Dkt. no. 48.) Plaintiff then filed his First Amended Complaint ("FAC"). (Dkt.  
18 no. 49.) Defendants now move to dismiss the FAC (the "Motion"). (Dkt. no. 52.) For the  
19 reasons set out below, the Motion is granted in part and denied in part.

20 **II. BACKGROUND**

21 This is an employment dispute. The FAC alleges the following. Plaintiff was  
22 employed by one of the Defendants.<sup>1</sup> Plaintiff worked for "Defendant" on garbage  
23 retrieval routes. (Dkt. no. 49.) Plaintiff used intermittent leave under the Family and

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25 <sup>1</sup>As in the Complaint, Plaintiff brings his action against "Defendant," a term that is  
26 not defined in the FAC. (See dkt. no. 49.) The FAC names two corporate entities, Reno  
27 Disposal Co. and Waste Management of Nevada, Inc., as defendants, but the factual  
28 allegations only relate to Plaintiff's employer, which is presumably one of the two named  
Defendants. This deficiency was pointed out in the Court's order dismissing the  
Complaint and it was not remedied. However, Defendants do not raise this issue and  
state that Plaintiff's employer is a subsidiary of its co-defendant. (Dkt. no. 52 at 3.)

1 Medical Leave Act (“FMLA”) for the period of May 31, 2011, through November 30,  
 2 2011. (*Id.*) A supervisory employee questioned whether Plaintiff’s leave had been  
 3 approved and contacted Plaintiff at home while Plaintiff was on FMLA leave to ask why  
 4 Plaintiff was not at work. (*Id.*) After utilizing his leave, Plaintiff faced added scrutiny at  
 5 work. (*Id.*) Plaintiff was terminated on January 18, 2012, for violating “a rule prohibiting  
 6 driving more than a quarter of a mile between stops in the stand-up right side drive  
 7 position.” (*Id.*) Plaintiff asserts that he “did not drive in excess of a quarter of a mile  
 8 between stops, and Defendant knew it.” (*Id.*) Plaintiff further asserts that Plaintiff’s  
 9 intermittent leave was used as a negative factor in the decision to terminate him and that  
 10 the date of termination was close in time to the date on which he returned from his FMLA  
 11 leave. (*Id.*)

12 The FAC asserts two claims for relief. (*Id.*) The first claim for relief alleges  
 13 Defendant interfered with Plaintiff’s FMLA leave and terminated him in retaliation for  
 14 taking FMLA leave. The second claim for relief alleges tortious discharge. (*Id.*)

15 Defendants move to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt.  
 16 no. 52.) Plaintiff filed an opposition (dkt. no. 55) and Defendants filed a reply in further  
 17 support of the Motion (dkt. no. 56).

18 **III. DISCUSSION**

19 **A. Legal Standard**

20 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which  
 21 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide  
 22 “a short and plain statement of the claim showing that the pleader is entitled to relief.”  
 23 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While  
 24 Rule 8 does not require detailed factual allegations, it demands more than “labels and  
 25 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*  
 26 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).  
 27 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
 28 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient

1 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at  
 2 678 (internal citation omitted).

3 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
 4 apply when considering motions to dismiss. First, a district court must accept as true all  
 5 well-pled factual allegations in the complaint; however, legal conclusions are not entitled  
 6 to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a  
 7 cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.  
 8 Second, a district court must consider whether the factual allegations in the complaint  
 9 allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the  
 10 plaintiff’s complaint alleges facts that allow a court to draw a reasonable inference that  
 11 the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does  
 12 not permit the court to infer more than the mere possibility of misconduct, the complaint  
 13 has “alleged — but not shown — that the pleader is entitled to relief.” *Id.* at 679 (internal  
 14 quotation marks omitted). When the claims in a complaint have not crossed the line from  
 15 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

16 A complaint must contain either direct or inferential allegations concerning “all the  
 17 material elements necessary to sustain recovery under some viable legal theory.”  
 18 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
 19 1106 (7th Cir. 1989) (emphasis in original)). Mindful of the fact that the Supreme Court  
 20 has “instructed the federal courts to liberally construe the ‘inartful pleading’  
 21 of *pro se* litigants,” *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987), the Court will  
 22 view Plaintiff’s pleadings with the appropriate degree of leniency.

23 **B. Analysis**

24 Defendants argue that Plaintiff’s claims are preempted by Section 301 of the  
 25 Labor-Management Relations Act (“LMRA”), 29 U.S.C. § 185(a), which states that suits  
 26 for violation of a collective bargaining agreement (“CBA”) may be brought in federal  
 27 district court. (Dkt. no. 52 at 5.) Defendants assert that, because his claims are  
 28 preempted, Plaintiff’s only remedy lies with the CBA, which requires Plaintiff to have

1 pleaded timely exhaustion of the CBA's grievance procedure. (*Id.* at 8.) Defendants  
 2 further contend that Plaintiff fails to state a claim with respect to his second claim for  
 3 tortious discharge. (*Id.* at 15.)

4 **1. Family Medical Leave Act**

5 Section 301 of the LMRA preempts a state-law claim "if the resolution of [that]  
 6 claim depends upon the meaning of a collective-bargaining agreement." *Detabali v. St.*  
 7 *Luke's Hosp.*, 482 F.3d 1199, 1203 (9th Cir. 2007) (quoting *Lingle v. Norge Div. of Magic*  
 8 *Chef, Inc.*, 486 U.S. 399, 405–06 (1988)). However, "as long as the state-law claim can  
 9 be resolved without interpreting the agreement itself, the claim is 'independent' of the  
 10 agreement for § 301 pre-emption purposes." *Lingle*, 486 U.S. at 410.

11 Section 301 preempts state-law claims and does not apply to Plaintiff's claims  
 12 under the FMLA. Indeed, Defendants do not offer any authority to support their  
 13 contention that the preemption doctrine applies to preempt a federal claim based on  
 14 violation of the FMLA. The major Supreme Court decisions interpreting and applying  
 15 Section 301 preemption have only done so with regard to state law claims. See *Lingle*,  
 16 486 U.S. at 413 ("In sum, we hold that an *application of state law is pre-empted* by § 301  
 17 of the Labor Management Relations Act of 1947 only if such application requires the  
 18 interpretation of a collective-bargaining agreement.") (emphasis added); *Allis-Chalmers*  
 19 *Corp. v. Lueck*, 471 U.S. 202, 220 (1985) ("We do hold that when resolution of a *state-*  
 20 *law claim* is substantially dependent upon analysis of the terms of an agreement made  
 21 between the parties in a labor contract, that claim must either be treated as a § 301  
 22 claim, or dismissed as pre-empted by federal labor-contract law.) (Emphasis added and  
 23 internal citation omitted.) The very purpose of Section 301's broad preemption is to  
 24 ensure that "doctrines of federal labor law uniformly . . . prevail over inconsistent local  
 25 rules." *Allis-Chambers*, 471 U.S. at 209-10 (quoting *Teamsters v. Lucas Flour Co.*, 369  
 26 U.S. 95, 103 (1962)). Generally speaking, the "touchstone of preemption is the presence  
 27 of a state law claim." *Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999).  
 28 Indeed, Congress's very preemption power comes from the Supremacy Clause.

1 Saridakis, 166 F.3d at 1276 (citing *Allis-Chambers*, 471 U.S. at 208). Plaintiff's ability to  
 2 pursue an action in federal court pursuant to federal law does not present a Supremacy  
 3 Clause issue. Plaintiff's rights under the FMLA are defined by federal law and not by  
 4 state law or the terms of an agreement. Therefore, the preemption doctrine does not  
 5 apply.

6 Defendants have presented no controlling authority from which this Court can  
 7 conclude that Section 301 of the LMRA preempts claims under the FMLA. The Court  
 8 determines that Plaintiff's claims under the FMLA are not preempted.

9 **2. Tortious Discharge**

10 As to Plaintiff's tortious discharge claim, Defendants argue that Plaintiff may not  
 11 assert a claim for tortious discharge based on the public policy of the FMLA. (Dkt. no. 52  
 12 at 12-13.) The Court agrees.<sup>2</sup>

13 "An employer commits a tortious discharge by terminating an employee for  
 14 reasons [that] violate public policy." *D'Angelo v. Gardner*, 819 P.2d 206, 212 (Nev.  
 15 1991). "[P]ublic policy tortious discharge actions are severely limited to those rare and  
 16 exceptional cases where the employer's conduct violates strong and compelling public  
 17 policy." *Sands Regent v. Valgardson*, 777 P.2d 898, 900 (Nev. 1989) (emphasis added).  
 18 Some examples of these cases include: "the discharge of an employee for seeking  
 19 industrial insurance benefits, for performing jury duty, for refusing to work under  
 20 unreasonably dangerous conditions, or for refusing to violate the law." *Alam v. Reno*  
 21 *Hilton Corp.*, 819 F.Supp. 905, 910 (D. Nev. 1993).

22 The FAC asserts that the important public policy at issue is Plaintiff's protected  
 23 leave under the FMLA. (Dkt. no. 49 at 4.) Even if this Court were to accept that the  
 24 FMLA provides a strong and compelling public policy, the Supreme Court of Nevada has  
 25 made it clear that "it will not recognize a claim for tortious discharge when an adequate  
 26 statutory remedy already exists, as it would be unfair to a defendant to allow additional

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27 <sup>2</sup>As Plaintiff's tortious discharge claim is plainly deficient, the Court need not  
 28 assess the effects of preemption on the claim.

1 tort remedies under such circumstances.” *Ozawa v. Vision Airlines, Inc.*, 216 P.3d 788,  
 2 791 (Nev. 2009) (citing *D’Angelo*, 819 P.2d at 217).

3 The FMLA allows employees to bring a civil action to recover equitable relief such  
 4 as reinstatement and promotion, and damages equal to lost wages, benefits, and  
 5 compensation, plus interest and additional liquidated damages in an amount equal to the  
 6 same. See 29 U.S.C. § 2617. It also allows a plaintiff to recover attorney’s fee, expert  
 7 witness fees, and costs. *Id.* Plaintiff argues that § 2617 of the FMLA is not  
 8 comprehensive enough because it does not allow for recovery for emotional distress.  
 9 (Dkt. no. 55 at 4.) However, the Supreme Court of Nevada has not stated that the  
 10 relevant recovery statute must provide all of the tort remedies available in a tortious  
 11 discharge claim. In *Shoen v. Amerco, Inc.*, 896 P.2d 469 (Nev. 1995), the court  
 12 considered only whether the relevant statute “provides for the same amount of tort-type  
 13 damages received by the plaintiff in *Valgardson*,” which the Supreme Court of Nevada  
 14 found to be sufficient. *Shoen*, 896 P.2d at 475. Section 2617 of the FMLA is at least as  
 15 comprehensive as statutory schemes in *Shoen* and *Valgardson*. See *Shoen*, 896 P.2d at  
 16 475 (Nev. 1995) (affirming summary judgment on tortious discharge claim where  
 17 relevant statute provided “for reinstatement, recovery of lost wages and benefits,  
 18 recovery of attorney’s fees, and recovery of [d]amages equal to the amount of the lost  
 19 wages and benefits.”) (internal citation omitted); *Valgardson*, 777 P.2d at 900 (refusing  
 20 to recognize claim for tortious discharge where plaintiffs were entitled to recover lost  
 21 wages and benefits, plus liquidated damages in the same amount).<sup>3</sup>

22 The Court is satisfied that the FMLA is at least as comprehensive as the statutes  
 23 in *Valgardson* and *Shoen*. Plaintiff’s tortious discharge claim may therefore not be  
 24 maintained.

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 26 <sup>3</sup>Conversely, in *D’Angelo*, the Supreme Court of Nevada found that plaintiff was  
 27 entitled to pursue a tortious discharge claim because the relevant statutes did not  
 28 provide a private right of action to recover damages. *D’Angelo*, 819 P.2d at 217-18.  
 Rather, it only allowed the administrator of the division of occupational safety and health  
 to bring an action for reinstatement and past wages. *Id.* In this case, Plaintiff is permitted  
 to pursue a private cause of action for damages under the FMLA.

1 **IV. CONCLUSION**

2 The Court notes that the parties made several arguments and cited to several  
3 cases not discussed above. The Court has reviewed these arguments and cases and  
4 determines that they do not warrant discussion as they do not affect the outcome of the  
5 Motion.

6 It is hereby ordered that Defendants' motion to dismiss first amended complaint  
7 (dkt. no. 52) is granted in part and denied in part. The FAC's tortious discharge claim is  
8 dismissed with prejudice. The Motion is denied as to Plaintiff's FMLA claim.

9 DATED THIS 10<sup>th</sup> day of August 2015.

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11 MIRANDA M. DU  
12 UNITED STATES DISTRICT JUDGE  
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